NOS. 14-18-01066-CR &
14-18-01067-CR

IN THE COURT OF APPEALS
FOR THE FOURTEENTH DISTRICT OF TEXAS

ELONDA CALHOUN
Appellant

v.

THE STATE OF TEXAS
Appellee

On Appeal from the 230th District Court
Harris County, Texas
Trial Court Cause Nos. 1545108 and 1545140

APPELLANT ELONDA CALHOUN'S MOTION FOR EN BANC RECONSIDERATION

ALEXANDER BUNIN
Chief Public Defender

DAUCIE SCHINDLER
Assistant Public Defender
Harris County, Texas
TBN. 24013495
1201 Franklin, 13th floor
Houston, Texas 77002
(713)-368-0016
(713)-368-9278 (FAX)
Daucie.Schindler@pdo.hctx.net

Counsel for Appellant

To the Honorable Justices of the Fourteenth Court of Appeals:

Elonda Calhoun, Appellant, did not motion the panel for rehearing pursuant to Tex. R. App. P. 49.1, in response to this Court's published panel opinion of July 23, 2020. *Calhoun v. State*, No. 14-18-01066-CR, 2020 WL 4211722, ___S.W.3d ___ (Tex.App.-Houston [14th Dist.] July 23, 2020, no pet.h.) and *Calhoun v. State*, No. 14-18-01067-CR, 2020 WL 4211722, ___S.W.3d ___ (Tex.App.-Houston [14th Dist.] July 23, 2020, no pet.h.). The majority opinion was authored by Justice Wise who was joined by Justice Jewell. Justice Poissant authored a dissenting opinion.

The Appellant is filing this Motion for En Banc Reconsideration pursuant to Tex. R. App. P. 49.7, in which she asks the En Banc Court to consider the ground for rehearing being raised.

Ground for Rehearing Number One

The Panel opinion fails to recognize the proper remedy in this case despite established precedent that recognizes the presumption of harm when an individual was denied counsel during the critical period to file a motion for new trial.

ARGUMENT

Appellant Elonda Calhoun entered a plea of guilty to two counts of aggravated robbery without a recommendation from the State. After a trial on punishment where the State called several witnesses and the defense called only one witness in addition to the testimony of Ms. Calhoun herself, the trial court sentenced her to fifty (50) years in the Institutional Division of the Texas Department of Criminal Justice in each case to

run concurrently. (C.R.1 at 123-24, C.R.2 at 93-116). On that same day, December 3, 2018, Ms. Calhoun gave notice of appeal in both cases. The trial court found her to be indigent for purposes of direct appeal and granted her trial lawyer's request to withdraw from representation. (C.R.1 at 123-27, C.R.2 at 121-22). However, the trial court did not assign appellate counsel until January 3, 2019, when the Harris County Public Defender's Office was appointed to the case. (C.R.1 at 127, C.R.2 at 124).

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to have counsel present at the "critical" stages of her criminal proceedings. *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009)(citing *United States v. Wade*, 388 U.S. 218, 227-228 (1967), and *Powell v. Alabama*, 287 U.S. 45, 57 (1932)); See U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right…to have the Assistance of Counsel for his defense."). One such critical stage is the 30-day period for filing a motion for new trial. *Cooks v. State*, 240 S.W.3d 906, 911 (Tex. Crim. App. 2007); see Tex. R. App. P. 21.4(a)(defendant has 30 days after trial court "imposes or suspends sentence in open court" to file motion for new trial). If a defendant is deprived of counsel during this stage of his prosecution, then the defendant's constitutional rights are violated. *Cooks*, 240 S.W.3d at 911.

When counsel represents a defendant during trial, there is a rebuttable presumption that trial counsel "continued to adequately represent the defendant during this critical [motion-for-new-trial] stage." *Cooks*, 240 S.W.3d at 911. In *Carnell*, the First Court of Appeals held that the defendant had "rebutted the presumption of continued

representation and ha[d] shown he was deprived of counsel for the entire period for filing a motion for new trial," based on the undisputed facts that (1) the defendant's trial attorney was permitted to withdraw on the day the period for filing a motion for new trial began and (2) the trial court did not appoint appellate counsel until six months after the period ended. *Carnell v. State*, 535 S.W.3d 569, 574 (Tex. App. –Houston [1st Dist.] 2017, no pet.).

A defendant who rebuts the presumption of continued representation is ordinarily entitled to relief only if he was harmed by the denial of counsel. However, in *Strickland v. Washington*, the United States Supreme Court recognized that in "certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice." 466 U.S. 668, 692 (1984)(citing *United States v. Cronic*, 466 U.S. 648, 659, & n.25 (1984)); see also *Batiste v. State*, 888 S.W.2d 9, 14 (Tex. Crim. App. 1994)(stating that the *Strickland* Court "acknowledged that with some varieties of Sixth Amendment violations, such as the actual or constructive denial of counsel altogether at a critical stage of the criminal proceedings,…prejudice is presumed"). Thus, an appellate court's analysis of harm resulting from the defendant's deprivation of counsel depends on whether the defendant was deprived of counsel for some or all of the thirty-day period for filling a motion for new trial. See *Carnell*, 535 S.W.3d at 572 (citing *Batiste*, 888 S.W.2d at 14).

In this Court's published opinion in *Parker*, a panel consisting of Justices Zimmerer, Spain, and Hassan held that the appellant had "rebutted the presumption of

continued representation and shown that he was deprived of counsel for the entire period for filing a motion for new trial." The panel went on to conclude that "[b]ecause appellant was deprived of counsel for the entire period, we presume that he was harmed." *Parker v. State*, No. 14-18-00948-CR, 2020 WL 3422301, at *2, ___S.W.3d ___, ___ (Tex. App. –Houston[14th Dist.] June 23, 2020, published order).

Here, Justices Wise and Jewell held that "[a]ssuming without deciding that appellant has rebutted the presumption of representation during the time period for filing a motion for new trial, 'this deprivation of counsel is subject to harmless error or prejudice analysis.'" *Cooks v. State*, 240 S.W.3d 906, 911-12 (Tex. Crim. App. 2007), was cited for the proposition that "[t]he error is harmless beyond a reasonable doubt if the defendant does not present a 'facially plausible claim' that could have been presented in a motion for new trial." See *Calhoun v. State*, No. 14-18-01066-CR, 2020 WL 4211722, ___S.W.3d ___ (Tex.App.-Houston [14th Dist.] July 23, 2020, no pet. h.) and *Calhoun v. State*, No. 14-18-01067-CR, 2020 WL 4211722, ___S.W.3d ___ (Tex. App.-Houston [14th Dist.] July 23, 2020, no pet. h.). The majority then proceeded to explain why none of the facially plausible claims presented (albeit unnecessarily) by the Appellant did not demonstrate harm. In her dissenting opinion, Justice Poissant correctly points out that "harm must be presumed" as this Court correctly held in *Parker*. See *Parker v. State*, No. 14-18-00948-CR, 2020 WL 3422301, at *2, ___S.W.3d ___, ___ (Tex. App. – Houston[14th Dist.] June 23, 2020, published order).

Although harm should clearly be presumed in this case, Appellant presented

several facially plausible issues that are worthy of investigation. The majority opinion rejects these facially plausible reasons based on unreasonable conclusions from the trial record and unreasonable expectations regarding what can be revealed about those issues in a public filing. A facially plausible reason is just that…plausible on its face. It would be a breach of the attorney client privilege, unethical, and certainly not strategically sound to offer details beyond the facial plausibility of the issues in a public filing. Although this is a case where harm is presumed, if it were not, the majority's insistence on disclosure of details beyond the required facial plausibility is an ethically impossible request.

Here, the logical and fair remedy is to abate the appeals and restart the timetable so that Ms. Calhoun may develop a record in a motion for new trial.

Prayer for Relief

For the reasons stated in her Ground for Rehearing, Ms. Calhoun moves that pursuant to Tex. R. App. P. 49.7, the En Banc Court should reconsider the panel opinion in this case and issue a new opinion, ultimately abating the proceedings, remanding the cases to the trial court, and restarting the appellate timetable to allow Ms. Calhoun the opportunity to file a motion for new trial.

Respectfully submitted,

Alexander Bunin
Chief Public Defender

/s/ Daucie Schindler
Daucie Schindler
State Bar No. 24013495
Public Defender's Office
Harris County, Texas
Assistant Public Defender
1201 Franklin, 13th Floor
Houston, Texas 77002
Daucie.Schindler@pdo.hctx.net
Tel: 713-274-6717
Fax: 713-368-9278

CERTIFICATE OF SERVICE

I certify that on the 3rd day of August, 2020, a copy of the foregoing instrument has been electronically served upon the Appellate Division of the Harris County District Attorney's Office.

/s/ Daucie Schindler
DAUCIE SCHINDLER

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Bar No. 24013495
daucie.schindler@pdo.hctx.net
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Associated Case Party: ELONDA CALHOUN

Name	BarNumber	Email	TimestampSubmitted	Status
Daucie Schindler		daucie.schindler@pdo.hctx.net	8/3/2020 3:48:32 PM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Cory Stott	24076946	Stott_Cory@dao.hctx.net	8/3/2020 3:48:32 PM	SENT
Eric E. Kugler	796910	kugler_eric@dao.hctx.net	8/3/2020 3:48:32 PM	SENT